Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HARRY A. CONNERS
PETITIONER

v.

COMMISSIONER OF LABOR
RESPONDANT

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New York
Appellate Division: Third Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) The question to be resolved in this case is did the State of New York Appellate Division Third Department change federal law by switching the burden of proving an exemption from the Fair Labor Standards Act (FLSA) regarding the overtime provisions from the employer to the job applicant/employee?

a) Petitioner asserts they did and if so, will many millions of employees in the State of New York have lost their protection under the FLSA?

b.) Can and does this case, now able to be used as precedent to further erode the protections offered by the FLSA and 29 CFR 541.2 et. seq. in other jurisdictions?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Corporate Transportation Group LTD., (CTG) appeared initially at the Unemployment Insurance hearing, but did not appear and submitted no papers to the Unemployment Insurance appeal Board, (UIAB) nor to the State of New York Supreme Court Appellate Division Third Department, nor to the State of New York Court of Appeals. CTG sent letters to UIAB, the Appellate Division Third Department and the State of New York Court of Appeals stating they would not be parties to the action.

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DECISION AND NOTICE OF DECISION OF ADMINISTRATIVE LAW JUDGE ALJ Case no. 003-08907, mailed and filed; May 13, 2003. See Appendix A 11-14.

Unemployment Insurance Appeal Board, Decision of the Board. Appeal Board No., 512635. Mailed and filed, August 5, 2003. See Appendix A 6-10.

Decision of the State of New York Supreme Court Appellate Division Third Department Case No. 94905. Decided and entered, July 15, 2004. See Appendix A 1-4

NYS Court of Appeals denies Motion to Review, Motion No. 839 dated, October 19, 2004. See Appendix A 5.

CASES IN SUPPORT OF PETITION

Martin v. Cooper Electric Supply co., 940 F. 2d. 896; (USCA; 3rd Cir, 1991) page 8, 13, 18 .

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 4L. Ed. 2d. 393, 80 S. Ct. 453 (1960) page 9, 13 .

Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 206, 15L. Ed. 2d 694, 86 S. Ct. 737 (1966) page 9

(Matter of Orlik [Commissioner of Labor], 257 AD 2d 837 [1999]) page 9 .

Matter of Zajaceskowski [Commissioner of Labor], 296 AD 2d811 [2002]) page 9 .

Alfred T. Scarmato, and James McGowan, Plaintiffs, v. Northern California Thrift Co. Et al., Defendants 184 F. Supp. 420; 1960 U.S. Dist. LEXIS 3687; 41 Lab. Cas. (CCH) P31,016 page 15 .

Ronald L. Berg, Borre A Schmidt, and Dale T. Sturgill v. United States, 49 Fed CI. 459, United States Court of Federal Claims (May 2001) page 20, 21 .

Hazel v. Michigan State Employees Ass'n, 826 F. Supp. 1096 (W.D. Mich. 1993); Campbell v. United States Air Force, 755 F. Supp. 893 (E.D. Cal. 1990), vacated on other grounds, 972 F.2d 1352 (Fed. Cir. 1992); Brock v. On Shore Quality Control Specialists, 107 Lab. Cas. (CCH) § 34, 972 at 45,235 (W.D. Tex. 1987) [but see 29 C.F.R. § 541.207(c)(2) &(3)]; and Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa 1982). Page 19

see: Clark v. J.M. Benson, Co., 789 F.2d 282, 288 (4th Cir. 1986). Page 19

Walling v. General Industries Co., 1947, 330 U.S. 545, 67 S.Ct 883, 91 L.Ed. 1088 page 15

RULES-LAWS-STATUTES-INTERPRETATIONS

29 CFR 541.2 page 8

29 CFR 541.215, through 29 CFR 541.215 page 10

FLSA and 29 CFR Section 13 (a)(1) page 11

29 CFR 541. 207. Page 14, 18

29CFR 541.214 {a}. page 14

29C.F.R. § 541.2(e)(2) page 14, 17

29C.F.R 541.2 {a}-{d} page 16-19

29C.F.R.§ 541.205 {a} page 17

29C.F.R § 541.205 {c}{5}d 541.205{c}{3}

5C.F.R § 551.206{1998) page 21

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A-1 to the petition and is reported at OFFICIAL CITE 9 AD3D 703
UNOFFICIAL CITE 779 NYS2D 827

The opinion of the New York State Court of Appeals appears at Appendix A-5 and is reported as a slip decision dated October 19, 2004 page 4 and is unpublished in any other form since this is a discretionary court.

The opinion of the State of New York Unemployment Insurance Appeal Board appears at Appendix A-6 and the Appeal Board Number is 512635 and is unpublished in any other form.

The opinion of the State of New York Unemployment Insurance Appeal Board Administrative Law Judge Section appears at Appendix A-11 and is cited as A.L.J. Case No. 003-08907 Mailed and Filed on May 13, 2003 and is unpublished in any other form.

The opinion of the New York State Department of Labor Notice of Determination to Claimant and Summary of Statement appears at Appendix A-15 and is cited as SSN: 066-36-1299 LO: 801 dated 3/19/03 and is unpublished in any other form.

The opinion of the New York State Department of Labor Notice of Revised Determination to Claimant appears at Appendix A-20 and is cited as SSN: 066-36-1299 LO:801 dated 3/20/03 and is unpublished in any other form.

BASIS FOR JURISDICTION

The Supreme Court of The United States has jurisdiction over this case because it is an appeal from a final order of the Supreme Court of the State of New York Appellate Division Third Department and the discretionary higher court to wit State of New York Court of Appeals denied review.

The Petitioner seeks review of errors of law made regarding the FLSA and 29 CFR 541.2 et. seq.

The date on which the highest state court decided my case was July 15, 2004. A copy of that decision appears at Appendix A-1.

The jurisdiction of this Court is invoked under 28 U.S. C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fair Labor of Standards Act (hereinafter FLSA) (see USC S 201 et seq) appears on Appendix A-4

29 USC S 213 [a] [1] appears on Appendix A-4

29 CFR 541.2 [a] [1]; 541.2 [e]; 541.205[a] appears on Appendix A-4, A-9

29 CFR 541.2 [b]; 541.214 [a] appears on A-4

STATEMENT OF THE CASE

This is a case about the wrongful denial of New York State Unemployment Insurance Benefits. Petitioner was employed by Corporate Transportation Group, LTD. (CTG) beginning on January 20, and or about through February 20, 2003. Petitioner was hired as an accounts receivable collector, who would spend a limited amount of time in the evening in the Small Claims Court at night when needed Petitioner never appeared in the Small Claims Court. Two weeks after being hired with court dates forthcoming within the next thirty days, petitioner advised the owner Mr. Ed Slinin and CFO Mr. Sheldon Shankowitz that he would accept compensatory time off in lieu of pay for the night court appearances. Management flatly refused petitioners request for any additional compensation whatsoever. Two weeks later petitioner once again objected to this unfair and unlawful policy. Petitioner's primary duty was a telephone bill collector. Petitioner had no authority to settle cases if he had gone to court nor did petitioner have discretion and independent judgement regarding any of his duties. Petitioner informed the CFO that he would not go to court under these unfair and unlawful circumstances. The CFO then told the petitioner if he was not going to court he was not needed and asked petitioner to bring him the files scheduled for court. When petitioner brought the files and went to sit down in the CFO's office, the CFO motioned him away and closed the door. Petitioner assumed he was fired. If petitioner was not fired and was not going to be compensated for hours in excess of 40, then he would have voluntarily surrendered his employment with good cause.

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States should grant this petition for the following reasons: The Appellate Division Third Department of the Supreme Court of the State of New York has changed federal law in that they have clearly and erroneously changed the Fair Labor Standards Act by shifting the burden of asserting and proving an exemption from the FLSA regarding overtime provisions from the employer to the employee. This change affects not only the petitioner, but untold countless other New York state employees. This decision (see Appendix A-1), in effect, nullifies the protections under the FLSA that must be applied uniformly in all of the states. Furthermore, this decision is a decision of first impression and as such, is precedent setting. If this Court agrees that the Appellate Division Third Department has indeed changed the burden of proving an exemption to the overtime provisions of the FLSA from the employer to the employee that change is drastic and indeed nullifies or confuses where the burden actually lies. For this among other reasons, this Court should grant petitioners Writ of Certiorari.

Petitioner has done a due and diligent legal search and was unable to find any case whatsoever that changed this burden from the employer to the employee. To the contrary, there is a bevy of case law and interpretations of the FLSA where this burden has not only remained squarely upon the shoulders of the employer and the bar on this issue has been interpreted very narrowly against the employer. If there is some doubt as to the existence of an exemption, the interpretations of the FLSA state that the employer has failed to meet their burden.

If this decision of the Appellate Division Third Department is allowed to stand, it can and will by greedy and overreaching employers be used as precedent in both New York state and even other states. Petitions brief clearly outlines both case law and interpretations on this issue. No court of competent jurisdiction has ever changed the burden of proving an exemption from the employer to the employee before.

The Appellate Division Third Department made numerous errors of law in interpreting the Federal Fair LaborStandards Act (FLSA) with regard to administrative exemption.

The term "administrative employee" is a term of art, having a special meaning. 29 CFR 541.2 defines the administrative exemption and reads , as follows: "The term employee employed is a bona fide ***administrative*** capacity in § (a)(1) of the Act shall mean any employee."

(a) "Whose primary duty consists of either"

(1.) "The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, and..."

(b) "Who customarily or regularly (emphasis added) exercises discretion and independent judgment..." Hence, the statute creates a two prong test regarding who is considered to be an administrative employee."

The Respondent failed to meet its burden that Appellant was an administrative employee and the burden of proof that an exemption applies rests squarely and unconditionally with the employer. In this regard Appellant draws the Court's attention the very language of the Fair Labor Standard Act regarding administrative exemption. See also 29 CFR 541.2.

In the case of Martin v. Cooper Electric Supply co., 940 F. 2d. 896; (USCA; 3rd Cir, 1991), the court reiterated that Section 13 (a)(1)'s exemptions from the Act's requirements are to be "...narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and un-mistakenly within their termsand spirit."

In the case of Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 4L. Ed. 2d. 393, 80 S. Ct. 453 (1960) the Supreme Court held that "[t]he burden of proving these exemptions rest upon the employer, and if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden." Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 206, 15L. Ed. 2d 694, 86 S. Ct. 737 (1966)

The court's attention is also drawn to the Appellate Division Third Department's decision, see Appendix A 1-4, where this issue was raised by Appellate Division, and incorrectly held (page A 2, paragraph 2),

> "We affirm. At the hearing claimant admitted that his negotiations with the employer, which ultimately resulted in his being hired, did not include a discussion of additional compensation for the court appearances that his job duties entailed.Sheldon Shankowitz, the employer's chief financial officer testified that no up-front compensation had ever been contemplated for he appearances because they were part of claimant's regular job duties. As it is well established that 'once the terms of employment have been agreed upon, such terms thereafter cannot be invoked as valid grounds for quitting.' (Matter ofOrlik[Commissioner of labor], 257 AD 2d 837 [1999]), we agreed with the Board that claimant's actions merely reflected a general dissatisfaction with his position and, therefore, are insufficient to establish good cause for resigning. (see Matter of Zajaceskowski [Commissioner of Labor], 296 AD 2d811 [2002])."

The above paragraph from the Appellate Division's decision is clearly in error and should be rejected by this Court for improperly shifting the burden of proving exemption from the employer to the employee/job

applicant and also violates sound public policy. This conclusion that the claimant admitted negotiations with the employer did not include a discussion of additional compensation for the court appearances that necessitated claimant to work in excess of a forty-hour work week clearly changes the burden of proving an administrative exemption, from the employer to the job applicant/employee. In the above quoted paragraph of the Appellate Division's decision it says ... "As it is well established that 'once the terms of employment have been agreed upon, such terms thereafter cannot be invoked as valid grounds for quitting'..." This is also an error of law because it is so broad as to allow the employer and the employee to agree to terms of employment that are over-reaching and in violation of the FLSA, as is the case in the matter before this Court.

This conclusion although dealing with 'good cause for resigning' hinges on and is dependent upon a finding that Appellant is an exempt employee under the FLSA. See appendix, page A23. Based upon the Appellate Division's rationale a job applicant must come to his pre-employment interview armed with a copy of the statute and ready to negotiate whether the law shall apply. However, in this regard an employer and employee cannot negotiate whether the law's provisions shall apply any more than they can negotiate whether to withhold Social Security or state disability insurance. The law protects employees from overreaching employers and the Appellate Division's holding in this case undermines the statutory protections that should be afforded not only to Appellant but to all workers. The Appellate Division's decision would require that one attending a pre-employment interview be armed with special expertise of the terms and provisions of the FLSA and 29 CFR 541.215, through 29 CFR 541.215, and to raise each issue of law pertained therein with the

employer to assure compliance. Furthermore, the decision shifts, in error, the burden which the FLSA and 29 CFR Section 13 (a)(1) from the employer to the employee/job applicant (see Martin v. Cooper Electric Supply co., 940 F. 2d. 896; (USCA; 3rd Cir, 1991).

In the case at bar, the record of transcript of the Unemployment Insurance hearing in Appellant's Appendix page A 24-62 is the sole source of evidence in this case whereby any conclusion of fact or law can and must be drawn. No other evidence exists. This transcript of hearing is devoid of any facts presented by the employer from which one could conclude that Appellant was an exempt employee. The employer does not even assert, no less prove that Appellant is an exempt employee, although the Administrative Law Judge (ALJ) tries valiantly to assist the employer in this regard. The daily job duties of the Appellant were virtually not raised at the hearing. The ALJ posed one question to Appellant on this issue. See Appendix, A 42, lines 21-26.

> Q. "Okay. And did you have a discussion with him about your job duties?" (Meaning Mr. Slinin)
>
> A. "Well, a general conversation with him, sure. My job was to collect and, and some of these cases would go to court and I would go to court at night."

There was no testimony of the percentage of Appellants time that he would spend in court by the employer or questions by the ALJ. The record establishes that Appellant had no authority to settle cases, or reduce debts in court or to even decide which cases would be taken to Small Claims Court. Those decisions clearly rested with management and not with Appellant.

In the decision of the Appellate Division, Third Department, the Court states: "...and exercised discretion

and judgment in determining which bills to collect or write off and when to institute court proceedings. Thus, the record supports the Board's determination that claimant was exempt from FLSA's overtime provisions..." See Appellate Division Third Department's decision, Appendix, A 3, bottom of paragraph one.

Also see transcript of hearing Appendix A 32 Lines 22-25, Question by ALJ to Mr. Shankowitz, which reads;

Q. And it was Mr. Conners himself who would set the court dates?

A. Well he files the application and the court sets the date. They notify him when to appear.

Also see transcript of hearing Appendix A 46 Lines 19-27. questions by ALJ to Mr. Conners, which reads;

Q. In other words, that was within your control, you want, for instance, on a certain day to have three cases done and you would decide which ones would go forward at that point?

A. I'm not sure.

Q. Were you selecting, were you selecting the cases for court?

A. I was selecting them and bringing them to Mr. Shankowitz for approval, yes.

Also see transcript of hearing Appendix A 45 Lines 26-31, questions by ALJ to Mr. Conners, which reads;

Q. Was this a back logged situation? In other words–

A. Incredible backlog situation. Some of them really should have–some I gave back in to write off.

The company had long perished.

The above three sets of questions and answers are the only parts of the hearing of transcript that deal with the

issue of the exercise of discretion and independent judgment. How then, could the Appellate Division Third Department reach the conclusion that the Appellant exercised discretion and independent judgment when the above questions and answers do not come close to supporting such a conclusion, bearing in mind that the employer's burden must fit plainly and unmistakably within their terms and spirits. Again, see Martin v. Cooper Electric Supply co., 940 F. 2d. 896; (USCA; 3rd Cir, 1991) And also again see, Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 4L. Ed. 2d. 393, 80 S. Ct. 453 (1960) the Supreme Court held that "[t]he burden of proving these exemptions rest upon the employer, and if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden."

Set forth in the transcript of hearing Appendix A 27 Lines 27-29, question by ALJ to Mr. Shankowitz the employer's CFO, which reads;

Q. And what was Mr. Conners position at the company?

A. Accounts receivable collections.

No where in the record of transcript of hearing does the employer (Mr. Shankowitz) ever assign to Appellant any managerial duties or any degree whatsoever the exercise of discretion and independent judgment.

Based upon the severity and enormity of the employers burden, as set forth in the Fair Labor Standards Act, the employer, as a matter of law failed to meet his burden by not asserting an exemption at the hearing or proving it.

This is an error in law. The transcript could not support such a conclusion or allow one to properly conclude that Appellant was an exempt employee. In fact,

the opposite is true. The transcript clearly shows that Appellant is not exempt.

It is important to note that the Appellate Division, Third Department has erroneously quoted the words "...and exercised discretion and judgment..." when the FLSA, see also 29 CFR 541. 207., calls for "...the exercise of discretion and independent (emphasis added) judgment (29CFR 541.214 {a}. See also 29 CFR 541.2 {e} (2)) known as the "short test" for the requirements of discretion and independent judgment.

The Secretary of Labor's interpretations elaborate on this requirement as follows"

> "In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term...moreover implies that a person has the authority or power to make an independent choice, (emphasis added) free from immediate direction or supervision and with respect to matters of significance."

Mr. Shankowitz also testified that Appellant did not even report to him, making it impossible for the Appellant to be deemed exempt for working "directly and closely" with administrator.

See Appendix, A 34 Lines 27-31 through page A 35 Lines 2-4, question by ALJ to Mr. Shankowitz, which reads;

> Q. Do you know whether there was a....whether the claimant, in fact, had gone to small claims court during the course of this four or five-week period that he was with your company?
>
> A. If he went, I think he may have gone one time, I believe.

I may be incorrect but he doesn't report to me.

Also see Appendix, A 30 Lines 11-13, question by ALJ to Mr. Shankowitz, which reads;

Q. Were you Mr Conners' immediate supervisor?

A. Yes.

Also see Appendix, A 30 Lines 23-25, question by ALJ to Mr. Shankowitz, which reads;

Q. Is there a manager or someone else who might have been a more immediate supervisor?

A. No, I would probably say it's me.

The above three sets of contradictory questions and answers are very troubling to the Appellant, in light of the credibility that appears to be afforded to Mr. Shankowitz by the Appellate Division Third Department.

Appellant asks the Court to see, Alfred T. Scarmato, and James McGowan, Plaintiffs, v. Northern California Thrift Co. Et al., Defendants 184 F. Supp. 420; 1960 U.S. Dist. LEXIS 3687; 41 Lab. Cas. (CCH) P31,016.

This case is about collectors of delinquent accounts and is directly on point. The court found as follows;

"...The employer has the burden of proving the existence of each of the condition or standards set up in the regulations if he claims that an employee is exempted. Walling v. General Industries Co., 1947, 330 U.S. 545, 67 S.Ct 883, 91 L.Ed. 1088.

The court in the Scarmato case further found as follows;

> "...The record reveals that each plaintiff reported directly to Marchese, that neither plaintiff supervised the work of any other employee, and that both were occupied principally with their collection activities, in which they did exercise limited discretion and judgment. There is no evidence that either plaintiff's primary duty was 'directly related to management

policies or general business operations' of his employer, [**3] nor that he directly assisted an executive, performed specialized or technical work, or executed special assignments. n1 Hence, plaintiffs were not 'administrative' employees as defined by the regulations..."

Also please see transcript of hearing, Appendix A 28 Lines 22-27, questions by ALJ to Mr. Shankowitz, which reads;

Q. And what was his normal work schedule?

A. 9:00 to 5:00.

Q. Monday through Friday, correct?

A. Yes, unless there was extenuating circumstances.

Petitioner was a telephone collector of delinquent accounts and from the hours of 9:00 to 5:00 spent ninety percent of his time making telephone calls, retrieving files, making notes of the sum and substance of those calls and scheduling a future date on a calendar for the purpose of follow up.

See 29 CFR § 541.2 (a)-(d).

Administrative Employees

a. Definition

An administrative employee, according to the long test, is one:

i. Whose primary duty consists of (i) the "performance of office or non-manual work directly related to management policies or general business operations" of the employer; or (ii) the "performance of functions in the administration of a schools system. Or educational establishment or institution...in work directly related to the academic instruction or training carried therein";

ii. Who "customarily and regularly exercises discretion and independent judgment";

iii. Who either (i) "regularly and directly assists" an executive or administrative employee, as those terms are defined in the regulations; (ii) "performs only under general supervision work along specialized or technical lines requiring special training, experience, or knowledge"; or (iii) "executes under only general supervision special assignments and tasks"; and

iv. Who does not devote more than 20% of any given workweek to non-exempt work.

Under the short test, the employee must perform work whose primary duty consists of the "performance of office or nonmanual work directly related to management policies or general business operations" of the employer and must include the "exercise of discretion and independent judgment." C.F.R. § 541.2(e)(2).

b. Issues

i. Production v. Administration

According to the regulations, "activities relating to the administrative operations of a business," may qualify for the exemption, but "production" work does not qualify.

29 C.F.R. § 541.205(a).

(1) For example of positions that have been found to qualify for the administrative exemption, see: 29 C.F.R. § 541.205(c)(5), § 541.205(c)(3).

(2) For examples of positions that have been found to be nonexempt, see: Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 903 (3d Cir. 1991), cert. Denied, 503 U.S. 936 (1992);

Dalheim v. KDFW- TV, 918 F.2d 1220, 1231 (5th Cir. 1990); Jones & Assocs. v. District of Columbia, 642 A.2d 130,133-34 (D.C. 1994).

Please note with regard to the Production v. Administration Dichotomy, the administrative exemption may, but not must qualify for the exemption, depending on the primary duty test and the discretion and independent judgment test. By simply not being a production employee does not automatically mean that an employee is exempt.

ii. Discretion and Independent Judgment

(1) "The exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term...implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." 29 C.F.R. § 541.207(a).

(2) The regulations clearly distinguish discretion and independent judgement from, "the use of skill in applying techniques, procedures, or specific standards." 29C.F.R.§ 541.207(b).

(3) For examples of employees who exercise sufficient discretion and independent judgement to qualify for the exemption, see: Hazel v. Michigan State State Employees Ass'n, 826 F. Supp. 1096 (W.D. Mich. 1993); Campbell v. United States Air Force, 755 F. Supp. 893 (E.D. Cal. 1990), vacated on other grounds, 972 F.2d 1352 (Fed. Cir. 1992); Brock v. On Shore Quality

Control Specialists, 107 Lab. Cas. (CCH) § 34, 972 at 45,235 (W.D. Tex. 1987) [but see 29 C.F.R. § 541.207(c)(2) &(3)]; and Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa 1982).

(4) For examples of positions that have been held nonexempt, see: Clark v. J.M. Benson, Co., 789 F.2d 282, 288 (4th Cir.1986).

Furthermore, the Appellate Division's interpretation of the applicable federal legislation, which is adopted by State law regarding the existence of an exemption from statutory, mandated overtime, is a question of law for this court to clarify, and not a mere question of fact. No court should substitute "divining the mind-set and intentions of a litigant" where there is a void of facts and one of the parties has the overwhelming duty to establish the facts.

In the decision of the Appellate Division, Third Department, page 1, last paragraph, first sentence, see appendix A 1-A2 first paragraph, which reads; "...Claimant was employed as an accounts receivable specialist responsible for collecting debts from delinquent account holders..." No where in the record of the transcript is the word specialist ever (emphasis added) used.

The word does however appear in the ALJ's decision, See Appendix A 12 paragraph 3, Finding of Facts, which reads "...The claimant was employed by a car and limousine service company as an accounts receivable specialist for one month until February 20, 2003..." Not only was the word specialist never used, a decision of what 'special skills' the Appellant had was also never (emphasis added) discussed. The word specialist however is a term of art used in the exemptions, however not the administrative exemption which is the subject matter of the case at bar.

It is restricted to scientist, lab, and X-ray technicians, people with highly specialized educational skills, and highly specialized training, such as programmers, and computer science experts, and the like.

It was never intended to be a 'catch all' for everyone who has performed the same type of job for many years. Under the application the career clerk would be a specialist, and exempt Please see the case of, Ronald L. Berg, Borre A Schmidt, and Dale T. Sturgill v. United States, 49 Fed Cl. 459, United States Court of Federal Claims (May 2001)HN1, which says in pertinent part, "...or a specialist in a management or general business function or supporting service who meets all of the following criteria..."

Which are;

> "...The employee performs office or other predominately non-manual work which is intellectual and varied in nature; or of a specialized technical nature that requires considerable (emphasis added) special training, experience, and knowledge. The employee must frequently (emphasis added) exercise discretion and independent judgment, only under general supervision, in performing the normal day to day work."

See HN13 of the Berg case above which reads; "...For plaintiffs to fall within the administrative exemption, defendant must meet all three of the applicable tests–the primary duty test, the nonmanual work and the discretion and independent judgement tests..." 5 C.F.R. § 551.206 (1998).

See HN21 of the Berg case above which reads; "There is a difference between one 'who merely works around the place' and one who has something to say about 'running the place'."

In the decision of the Appellate Division, see Appendix A2 paragraph 1, which reads; "...At the time he was hired, it was understood and agreed between claimant and his employer that his employment duties would include making evening (emphasis added) appearances in small claims court on the employer's behalf..." What was never discussed was Appellant working far in excess of 40 hours per week, without the protection of the federal minimum wage and overtime provisions guaranteed in FLSA and 29CFR 541.2 et seq.

It is clearly the burden of the employer to both assert and prove the exemption. By admission in the decision of the Appellate Division Third Department and by transcript of hearing it was never discussed by the employer, and the burden to establish this rests fully, clearly and without exception on the employer.

Please see transcript Appendix A 42 Lines 27-31 question by ALJ to Mr. Conners; which reads

> Q. Was there any discussion of your having a modified work schedule or compensatory time off or additional pay for going to court at–
>
> A. Not at that interview. At a previous, yes.

See also Appendix A 44 Lines 22-31through A 45 Lines 2-6 questions by ALJ to Mr. Conners which reads;

> Q. Okay. Now then did you, in fact, meet with Mr. Slanin (sic) and Mr. Shankowitz?
>
> A. I did.
>
> Q. And what happened then?
>
> A. Well, he absolutely refused to give me any compensatory time off or pay.
>
> Said it was part of my job and not discussed at this last interview.
>
> I informed him that it was discussed at the previous two and I didn't think that it was

something that even needed to be discussed since in my opinion, I was not an exempt employee and I would had to, again, in my opinion by law, either been paid or compensated in some way.

I managed no one.

Also see in the Appellate Divisions decision, Appendix A 2 paragraph 1, which reads:

"Claimant left his employment after one month because he felt that his employer owed him additional compensation for the court appearances. Claimant's application for unemployment insurance benefits was denied on the grounds that he voluntarily left his employment without good cause and made a willful false statement on his benefits application by indicating that he had been discharged..."

The language is inaccurate and misleading. Please see A 5, Notice of Revised Determination to Claimant, which reads;

NOTICE OF DETERMINATION OF WILLFUL MISREPRESENTATION:

"CLAIMANT MADE FALSE STATEMENTS. CLAIMANTS RIGHT TO FURTHER BENEFITS IS REDUCED BY 004 DAYS UNTIL 02/26/2005"

It is important to note that the alleged willful false statement, although not willful at all resulted in a four (4) day penalty and not a denial of benefits.

It was the duty of the employer to clearly and unmistakenly assert and prove the exemption. See FLSA, Appellant respectfully directs the court to the New York State Department of Labor, Unemployment Insurance rules and laws, Index 1660, see Appendix A 23, which Appellant brought up at every stage, which reads and is attached to

this motion, so the Court may readily access it, 1600 Hours, subdivision Increase in hours; Overtime. "Good cause was found to exist for voluntary leaving of employment when evidence disclosed that claimant's normal working hours were increased without a corresponding increase in compensation." (A.B. 9964-43; similarly A.B. 37, 900-53, also A.B. 6896-42). Although the Court of Appeals has never ruled on this issue, and the Appellate Division, although brought to their attention in this case declined to issue a ruling on this point., the UIAB has ruled on three occasions, always in keeping with index 1600 Hours, Increase in hours; overtime.

In A.B. 6896-42, the Appeal Board held that the evidence clearly shows that for months claimant was compelled to work longer hours and perform additional duties without extra compensation and that claimant voluntarily left her last employment with good cause.

In A.B. -43 9964, the Appeals Board held as follows: "the evidence discloses that claimant's normal working hours were increased without a corresponding increase in compensation. This drastic change in terms and conditions of employment constitutes sufficient justification for claimants voluntary leaving (Appeal Board 6896-42).

In A.B. 37, 900-53, the Appeals Board also sustained a finding that an employee was entitled to receive unemployment benefits since the employee departed after the employer refused to payt overtime as required by law. This case is exactly on point, however all three are in keeping with index 1600.

Petitioner now addresses the last paragraph of the Appellate Division, Third Department's decision, see Appendix A 3-4. This paragraph discusses petitioner failing to take reasonable steps to protect his employment.

The Appellant already had a conversation with Mr. Slinin and Mr. Shankowitz, regarding this issue two weeks prior to his last day. The matter was fully vetted and the door on Appellant's just and lawful request was flatly and emphatically closed. No further conversations with Mr. Slinin could have rectified the matter and brought the employer into compliance with the federal and state statues governing overtime. Pursuant to A.B. 37, 900-53 cited above no further conversation was needed, however, Appellant did everything in his power to rectify this matter when he met with both Mr. Slinin and Mr. Shankowitz.

See transcript of hearing, see A 31Lines 20-25, question by ALJ to Mr. Shankowitz, which reads;

> Q. As I understand your testimony that the last discussion you had with Mr. Conners was that he'd have to wait until Monday when the president returns and perhaps can work something out?
>
> A. That's what I said, okay. But we had a prior meeting.

See transcript of hearing, see, Appendix A 34 Lines 2-11 question by ALJ to Mr. Shankowitz, which reads;

> Q. At any time did Mr. Conners have other discussions with you about the situation and report things back to you that you hadn't participated in, for instance, any other discussions that he had with Mr.–
>
> A. The first time that he brought this up to me, I presented–I said to him, I can't make the decision, you have to speak with Mr. Slinin.
>
> So we went into Mr. Slinin's office and that's when the conversation took place.

See transcript of hearing Appendix, A 45 Lines 14-21question by ALJ to Mr. Conners, which reads;

Q. Okay. How were things left at the end that discussion with Mr. Slanin?

A. That absolutely there would be no compensation for night court time and the appearances at night court, although I could put three case together in a night were at least three night a week and hopefully there–the case are in that day.

See transcript of hearing Appendix, A 47 Lines 7-17 questions by ALJ to Mr. Conners, which reads;

Q. Tell me did you mention that in the conversation with Mr. Slanin(sic) and Mr. Shankowitz?

A. Yes I did.

Q. And what was the comment or reaction

A. Mr. Slinin's reaction was that's, that's what the job entails, you're not getting any other compensation,. He was real brusque and quick about it. It was a very short meeting...It was, you know, put it in your pipe and smoke it, that's the way it is.

This was not a case where Appellant didn't do everything he could to have the employer comply with the law. The decision makes it appear Appellant didn't "protect his job". The Appellate Division, then goes on to rule that the Appellant "left the office and did not return, even after Mr. Shankowitz, through another employee, attempted (emphasis added) to contact him and induce him to return to work. This is not what happened and it's all in the record.

The attempt by Mr. Shankowitz to reach the petitioner was not credible. First of all, Mr. Shankowitz never actually claimed he personally called the petitioner.

See transcript of hearing Appendix A31 Lines 8-14 question by ALJ to Mr. Shankowitz, which reads;

Q. Did you personally try to reach the claimant?

A. I asked for his phone number from one of the people that knows him and from personnel and he didn't answer his phone. The fellow that works for us tried to get him a number of times.

Please see transcript of hearing Appendix A 49 Lines 28-31 through A50 Lines 2-26 questions by ALJ to Mr. Conners, which reads;

Q. And do you have any comments on the attempts that Mr. Shankowitz described for to try to reach you by telephone?

A. Yes. My telephone has an answering machine and as a matter of fact, the person that they asked to contact me reached me.

Q. When was that?

A. That day, that afternoon because Mr. Shankowitz had gone to Ed Misella's office and said what happened to Harry, where's Harry. I haven't seen him in a couple of hours. Ed Misella called me and said, what happened. I said, and I had Ed Misella comes for the company I last worked for. We worked there together for a few years. And I said, Shelly fired me over this court issue. I told him I was not going to court 12, 16 hours a week with no further compensation. And he told me he didn't need me, give him the cases for court. Ed said, well, listen, it can be worked out, it can be worked out. Now, Ed had no authority to work it out. And I said to Ed, have Shelly or Eddie (Slinin) or someone call me if they wanna work it ut because I'll be glad to work it out...

Please see transcript Appendix A 30 Lines 30-31 through A 31 Lines 2-4 question by ALJ to Mr. Shankowitz, which reads;

Q. –when, when the president returned on Monday, you'd have a further discussion?

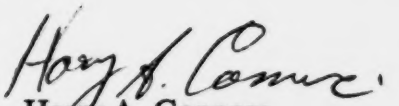
A. It may have been a Wednesday or a Thursday 'cause he was missing for a few days and nobody could reach him by phone.

Mr. Shankowitz heard all this contradictory testimony regarding Ed Misella reaching me that day and never made an attempt to clarify it, either by questions to the Appellant, or a closing argument, and neither did the ALJ.. It is not credible that Mr. Shankowitz the CFO, would ask Ed Misella to contact the Appellant, and then to say he couldn't reach him, and that he was missing. He did reach the Appellant and the lack of Mr. Shankowitz's questions to the Appellant, or the ALJ's questions to the Appellant is troubling.

CONCLUSION

Petitioner has done a due and diligent legal search and has not found one case where any State or Federal Court has changed the burden of proving an exemption from the employer to the job applicant/employee, and that is precisely what has happened in this case. Petitioner prays that this Court grants a Writ of Certiorari and reverses the irreparable harm that may well befall millions of employees in the State of New York.

Respectfully submitted,



Harry A. Conners
Petitioner Pro-se
30 Fifth Avenue 2D
New York, NY 10011

No.

IN THE

Supreme Court of the United States

HARRY A. CONNERS

v.

COMMISSIONER OF LABOR

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New York
Appellate Division: Third Department

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

HARRY A. CONNERS
PETITIONER PRO SE
30 FIFTH AVENUE 2D
NEW YORK NY 10011
(212) 777-0129

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decides and Entered: July 15, 2004 94905

In the Matter of the Claim of
HARRY A. CONNERS,
Appellant.

COMMISSIONER OF LABOR
Respondent.

Calendar Date: May 25, 2004
Before: Mercure, J. P., Crew III, Carpinello, Lahtinen and Kane, JJ.

Harry A. Conners, New York City, appellant pro se.
Eliot Spitzer, Attorney General, New York City (Mary Hughes of counsel), for respondent.

Kane, J.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed August 5, 2003, which, inter alia, ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause.

Claimant was employed as an accounts receivable

specialist responsible for collecting debts from delinquent account holders. At the time that he was hired, it was understood and agreed between claimant and his employer that his employment duties would include making evening appearances in small claims court on the employer's behalf. Claimant left his employment after one month because he felt that his employer owed him additional compensation for the court appearances. Claimant's application for unemployment insurance benefits was denied on the grounds that he voluntarily left his employment without good cause and made a willful false statement on his benefits application by indicating that he had been discharged. Following a hearing, and Administrative Law Judge and the Unemployment Insurance Appeal Board sustained the determination. Claimants appeals.

We affirm. At hearing, claimant admitted that his negotiations with the employer, which ultimately resulted in his being hired, did not include a discussion of additional compensation for the court appearances that his job duties entailed. Sheldon Shankowitz, the employer's chief financial officer, testified that no up-front compensation had ever been contemplated for the appearance because because they were part of claimant's regular job duties. As it is well established that' "once the terms of employment have been agreed upon, such terms cannot thereafter be invoked as valid grounds for quiting" (Matter of Orlik [Commissioner of Labor], 257 AD2d 837 [1999]), we agree with the Board that claimant's actions merely reflected a general dissatisfaction with his position and, therefore, are insufficient to establish good cause for resigning (see Matter of Zajaceskowski [Commissioner of Labor], 296 AD2d 811 [2002]).

The Board did not abuse its discretion in determining that claimant was not entitled to overtime pay because he was exempt from the Fair Labor Standards Act

(hereinafter FLSA) (see 29 USC S 201 et seq.). FLSA exempts from its overtime provisions those who are employed "in a bona fide executive, administrative or professional capacity" (29 USC S 213 [a] [1]). An employee works in an administrative capacity if he or she receives an anual salary above a certain level and his or her primary duties consist of office or nonmanual work directly related to the employer's general business operations, which means work of substantial importance to the employer's business or administrative operations rather than production work (see 29 CFR 541.2 [a] [1]; 541.2 [e]; 541.205 [a]; Matter of Scott Wetzel Servs. V New York State Bd. Of Indus. Appeals, 252 AD2d 212, 214 [1988]). The performances of administrative duties generally requires the exercise of discretion and independent judgement (see 29 CFR 541.2 [b]; 541.214 [a]). The evidence showed that claimant was a salaried employee $50,000 annually, worked in an office on nonmanual work, was not involved in the employer's production work of providing car and limousine service, and exercised discretion and judgement in determining which bills to collect or write off and when to institute court proceedings. Thus, the record supports the Board's determination that claimant was exempt from FLSA's overtime provisions.

Even if claimant was entitled to and was wrongly denied overtime pay, he failed to take reasonable steps to protect his employment. Shankowitz testified that, upon claimant's request that he receive additional compensation, Shankowitz advised him to wait for the employer's president to return to the office so the claimant could discuss the matter with him. Rather than waiting to speak to the president, however, claimant left the office and did not return, even after Shankowitz, through another employee, attempted to contact him and induce him to return to work. Under these circumstances, claimant's

failure to provide his employer with an opportunity to address his complaint further militates against a finding of good cause (see Matter of Huntington [Commissioner of Labor] , 295 AD2d 736, 737 [2002]; Matter of Caldarone [Commissioner of Labor] , 270 AD2d 562 [2002]), and also provides substantial evidence supporting the Board's finding that claimant's statement on his application that he had been discharged constituted a willful misrepresentation (see Labor Law S 594; Matter of Zakrzewski [Commissioner of Labor], 305 AD2d 790, 790-791 [2003]). Claimant's contrary testimony that Shankowitz told him that he was no longer needed and directed him to bring his case files to him, prompting claimant to leave under the assumption that he had been discharged, presented a credibility issue that was properly resolved by the Board (see Matter of Huntington [Commissioner of Labor], supra at 737). Because we find that the aforementioned constitutes substantial evidence sopporting the Board's decision, we decline to disturb it.

Mercure, J.P., Crew III, Carpinello and Lahtinen, JJ., concur.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the.....nineteenth.....day of.....October.....2004

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

3-10 Mo. No. 839

In the Matter of
Harry A.Conners,

Appellant.

Commissioner of Labor,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Clerk of the Courts

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO BOX 15126
ALBANY NY 12212-5126
(518) 402-0205

Mailed and Filed: August 5, 2003

IN THE MATTER OF: Appeal Board No. 5122635

HARRY A. CONNERS
30 FIFTH AVENUE 2D
NEW YORK NY 10011

DAVID ISRAEL
5 HANOVER SQUARE
NEW YORK NY 1004

CORPORATE TRANSPORTATION
GROUP LTD
335 BOND ST
BROOKLYN NY 11231-5005

A.S.O. - Appeals Section A.L.J. Case No. 003-08907
Department of Labor Office: 801
S.S.A. No. 066-36-1299

DECISION OF THE BOARD

PRESENT: Deane M. Cooke, Michael T. Greason
MEMBERS

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective February 21, 2003, on the basis that the

claimant voluntarily separated from employment without good cause, and reducing the claimant's right to receive future benefits by four effective days on the basis that the claimant made a wilful misrepresentation to obtain benefits. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on the behalf of the employer. By decision filed May 13, 2003 (A.L.J. Case No. 003-08907), the Administrative Law Judge sustained initial determinations.

The Claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in the case, the Board makes the following

FINDINGS OF FACT: The claimant was employed by a limousine service for one month in the position of accounts receivable collections, earning an annual salary of $50,000.00. The claimant worked under the Chief Financial Officer ("CFO") and his job duties included filing applications in Small Claims Court in furtherance of his collections duties, if he thought the case warranted it, and appealing in court when the case was scheduled. All cases in Small Claims Court were scheduled in the evening.

The claimant had interviewed with the company president in previous years but has not accepted employment at those times. He again had an interview with the company president, prior to beginning his employment on January 20,2003; there was no discussion at that time regarding any extra compensation to be paid to the claimant

for his evening appearances in Small Claims Court. About two weeks after starting his employment , the claimant met with the company president and the CFO, at which time he indicated that he wanted to receive extra compensation for the Small Claims Court appearances but was willing to accept compensatory time, rather than extra pay. The president replied that the claimant's court appearances were covered by his annual salary and he would not receive extra pay for those appearances.

On or about February 20, 2003, just prior to lunch, the claimant spoke to the CFO again about the issue of extra pay. The CFO responded that it was not within his discretion to accede to the claimant's demands and that the claimant should speak to the company president on the following Monday, when the president returned from a trip. The CFO also asked the claimant to bring him the court files, as he wanted to determine how often the claimant had to appear in Small Claims Court. The claimant then left the office and did not return. Later that afternoon, the claimant received a telephone call from a coworker, who explained that the CFO had been inquiring into the claimant's whereabouts.

The claimant subsequently filed a claim for unemployment benefits and informed the Department of Labor that he had been fired from his employment.

OPINION: The credible evidence establishes that the claimant quit his employment after a second request for extra pay had been denied. We reject the claimant's testimony that he was fired by the CFO during the February 20 meeting. In so finding, we accept as more convincing the testimony of the CFO that he did not discharge the claimant. Moreover, even if we accept for the sake of argument the claimant's testimony that the CFO told him that if he wouldn't go to court he wasn't needed, a discharge has not been established. The remark, as testified

to by the claimant, is sufficiently ambiguous that the claimant could not reasonably rely on it to establish a discharge. Further, the claimant's own testimony also establishes that the CFO was inquiring into his whereabouts later that same day: It is not credible that the CFO would have been looking for the claimant if he had discharged the claimant a few hours earlier.

The evidence also establishes that the claimant quit because he was not receiving extra pay for his evening appearances in Small Claims Court. However, the evidence does not establish that he was entitled to such extra pay. Although the claimant contends that the issue was not discussed at the interview which resulted in his acceptance of employment. Therefore, he cannot rely on any earlier discussion to establish that extra pay was a term and condition of employment.

The claimant also contends that he was a non exempt employee pursuant to the provisions of the Fair Labor Standards Act ("FLSA") and therefore entitled to overtime pay. The FLSA provides that, among other exemptions, white collar employees employed in executive, administrative or professional positions are exempt from the overtime provisions of the FLSA. 29 CFR S 541.2 defines and administrative employee, in pertinent part, as: [A]ny employee (a) whose primary duty consists of either: (1) The performance of office or nonmanual work directly related to management policies or general business operation of his employer... and (b) who customarily and regularly exercises discretion and independent judgement ; and (c) (1) who regularly and directly assists ...an employee employed in a bona fide executive or administrative capacity...and(2) Who performs under only general supervision..and (e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week. It is clear form the claimant's salary and

job duties that he falls within the ambit of this provision and is therefore exempt from the overtime provisions of the FLSA.

The claimant's reason for quitting did not provide him with good cause under the employment insurance law and, accordingly, we conclude that the claimant was separated from employment under disqualifying circumstances.

The credible evidence also establishes that the claimant informed the Department of Labor that he had been fired. It is clear from the testimony regarding the conversation between the claimant and the CFO as well as the claimant's acknowledgment that the CFO was inquiring into his whereabouts a few hours after the claimant walked out of the office, that the claimant was aware that he had not been discharged. Thus, his accordingly, we conclude that the claimant is subject to the forfeit penalty.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determinations, disqualifying the claimant from receiving benefits, effective February 21, 2003, on the basis that the claimant voluntarily separated from employment without good cause, and reducing the claimant's right to receive future benefits by four effective days on the basis that the claimant made a wilful misrepresentation to obtain benefits, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

Deane M Cooke, MEMBER

HV:DE

Michael E. Greason, MEMBER

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
ADMINISTRATIVE LAW JUDGE SECTION
PO BOX 697 MAIL STOP 6F
NEW YORK NY 10014-0697
(212) 352-6982

DECISION AND NOTICE OF DECISION

A.L.J. Case No. 003-08907
Mailed and Filed : May 13, 2003

IN THE MATTER OF: S.S.A. No. 066-36-1299

HARRY A. CONNERS
30 FIFTH AVENUE 2D
NEW YORK NY 10011

V

CORPORATE TRANSPORTATION
GROUP LTD
335 BOND ST
BROOKLYN NY 11231-5005

Department of Labor Office: 801
Hearing Requested: March 28, 2003

ISSUES: Voluntary leaving of employment without good cause
Wilful false statement to obtain benefits.

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective February 21, 2003, on the basis that the claimant voluntarily separated from employment without good cause; and reducing the claimant's right to receive future benefits by four effective days on the basis that the claimant made a wilful misrepresentation to obtain benefits. The claimant requested a hearing.

Hearings were held at which testimony was taken. There were appearances by the claimant and on behalf of the employer.

FINDING OF FACTS: The claimant was employed by a car and limousine service company as an accounts receivable specialist for one month until February 20, 2003. He was hired by the employer's president at a salary of $50,000. Among his duties were instituting collection actions in small claims court and representing the employer in such actions. Such court are in the evening.

On or about February 6, 2003, the claimant indicated to the employer's Chief Financial Officer (CFO) that rather that being paid overtime pay for going to court at night, he would rather have compensatory time off. The CFO replied that the claimant would have to discuss the matter with the president. The three of them met shortly thereafter, and the president rejected the claimant's request compensatory time off or overtime pay. At the time of hire there had been no mention of the claimant receiving additional compensation or time off for small claims court appearances. However, the president indicated that such additional work would be taken into consideration in calculating any bonuses for the claimant at the end of the year.

Midday on February 20, 2003, when the president was out of the office for a few days, the claimant told the CFO that he was not willing to go to small claims court

unless he was compensated therefor in some manner. The CFO indicated that he did not need the claimant to work for him without such evening work, and asked the claimant to bring him the files of the pending court cases. The claimant retrieved the files for the CFO, who then waived him away. The claimant went home. Two hour later he received a call from a coworker, who indicated they had expected him to return to the office after lunch. The coworker further commented that the claimant should be able to work things out with the president. The claimant replied that the president or CFO should give him a call.

The claimant applied for benefits without returning to work or discussing the matter further with the president or CFO. The claimant indicated to the Labor Department in connection therewith that he was separated from employment because he had been fired.

OPINION: Pursuant to Labor Law S 593 (1) (a), a claimant is disqualified from receiving benefits after a voluntary separation from employment without good cause. Pursuant to Labor Law S 594, a claimant who has wilfully made a false statement or representation to obtain benefits shall forfeit benefits.

The credible evidence establishes that two weeks after the president rejected the claimant's request for additional compensation or time off for doing small claims work at night, the claimant advised the CFO that he was unwilling to do such work without additional compensation or time off. This was established by the claimant's own testimony, as was the fact that there was no mention at the time of hire of his receiving additional compensation for such work. It is significant that although he further testified that he assumed he had been fired when the CFO did not meet his demand, and then waived him away after he brought the CFO the files on the pending small claims cases, the claimant acknowledged receiving a telephone call

at home shortly thereafter from a colleague who indicated that they have been looking for him and that he had not been fired. I therefore conclude that the claimant was unwilling to return to work unless the employer met his demands. As this had been mutually agreed upon when he was hired, I hold that the claimant voluntarily left his employment without good cause. In view of this holding, I further conclude that he made a wilful false statement to obtain benefits when he indicated to the Labor Department that the employer had fired him.

DECISION: The initial determinations, disqualifying the claimant from receiving benefits, effective February 21, 2003, on the basis that the claimant separated from employment without good cause; and reducing the claimant's right to receive future benefits by four effective days on the basis that the claimant made a wilful misrepresentation to obtain benefits, are sustained.

The claimant is disqualified from receiving benefits, effective February 21, 2003, until the claimant has subsequently worked in employment and earned remuneration at least equal to five times the claimant's weekly benefit rate. Employment and earnings from non-covered, excluded or self-employment will not count.

The claimant shall forfeit benefits for four effective days.

/s/ HENRY A SULLIVAN
Administrative Law Judge

NYS DEPARTMENT OF LABOR
PO BOX 15131
ALBANY NY 12212-5131
(NOTE: Original document written in caps.)
NEW YORK STATE DEPARTMENT OF LABOR
NOTICE OF DETERMINATION TO CLAIMANT

DATE MAILED: 3/19/2003
SSN: 066-36-1299 LO: 801

HARRY A CONNERS
30 FIFTH AVENUE 2D
NEW YORK NY 10011

PLEASE REFER TO THOSE ITEMS WHICH ARE SELECTED 'X' BELOW AND READ THE BACK OF THIS FORM

1.

[XX] NOTICE OF DETERMINATION

NO UNEMPLOYMENT INSURANCE BENEFITS WILL BE PAID TO YOU FOR THE PERIOD BEGINNING 02/21/2003 UNTIL YOU HAVE SUBSEQUENTLY WORKED FOR AN EMPLOYER AND EARNED AT LEAST 5 TIMES YOUR WEEKLY BENEFIT RATE. EMPLOYMENT AND EARNINGS FROM NON COVERED, EXCLUDED OR SELF-EMPLOYMENT WILL NOT COUNT. YOUR WEEKLY BENEFIT RATE IS $405.

DETERMINATION

YOU QUIT YOUR JOB WITHOUT GOOD CAUSE.

REASON

YOU LEFT BECAUSE YOU WERE DENIED COMPENSATORY TIME FOR COURT APPEARANCES IN ADDITION TO YOUR REGULAR SALARY. THIS WAS NOT A CONDITION OF HIRE. YOU WERE A SALARIED EMPLOYEE EXEMPT FROM RECEIVING ADDITIONAL COMPENSATION OR TIME FOR COURT APPEARANCES.

2

☐ NOTICE OF DETERMINATION OF WILFUL MISREPRESENTATION

REASON

☐ This notice supersedes the one sent you dated _____ which has been cancelled.

TO PROTECT YOUR RIGHTS, READ THE BACK OF THIS FORM

By: _____/s/ C KNIGHT_____
FOR THE COMMISSIONER OF LABOR

LO 412 (4-99)

TCC 413.2 Summary of Statement

(NOTE: Original document written in caps.)

NAME: HARRY CONNERS SS# 066-36-1299 LO#0801

Effective Date: 02/24/2003

Employer Name CORPORATE TRANSPORTATION

Employer Telephone Number 718-643-6053

Today's Date 03/19/2003

ISSUE: VQ

Statement taken by: C M KNIGHT

3/17/03 MR. SHANKOWITZ, CFO STATED THE CLAIMANT HAD AN AGREEMENT WITH THE EMPLOYER TO DO REPRESENT (sic)THE COMPANY IN COURT. THE CLAIMANT WAS A COLLECTOR. THIS WOULD OCCUR EVERY WEEK OR EVERY COUPLE OF WEEKS. THE CLAIMANT DECIDED HE DID NOT WANT TO GO WITHOUT ADDITIONAL COMPENSATION TO ACCRUE HOURS FOR ADDITIONAL VACATION TIME. HE WALKED OUT AND NEVER CAME BACK. HIS LDW 2/20/03. HE SPOKE WITH ANOTHER EMPLOYER AND TOLD HIM HE WAS NOR COMING BACK. THE CONDITION OF HIRE WAS THAT HE DO TO (sic) COURT ON EVERYTHING TAKEN CARE OF BY HIM WITH NO ADDITIONAL PAY OR TIME FOR COURT APPEARANCE. THE CLAIMANT WAS AN ACCOUNT RECEIVABLLE (sic) COLLECTOR HE EARNED APPROX $865.00 WEEKLY . HE WAS THEIR (sic) APPROXIMATLY (sic) 1 MONTH.. MR SHANKOWITZ STATED HE HAD NOT (sic) AUTHORIZATION TO APPROVE ADDITIONAL PAY OR TIME THEREFORE

HE WAS TOLD HE WOULD FIND OUT ABOUR (sic) THIS ISSUE WHEN THE OWNER RETURNED FROM ABROAD.

3/18/03 MR SHANKOWITZ STATED THE CLAIMANT WAS NOT AN HOURLY EMPLOYEE THE CONDITION OF HIRE. (sic) HE HAD A WEEKLY BASE SALARY. HE WAS NOT DUE OVERTIME OR TIME ACCRUALS. HIS SALARY WAS $50,000.00.

03/18/03 MR. CONNERS STATED THAT HE HAD A MEETING A WEEK BEFORE HE LEFT WITH MR. ED SLININ, OWNER AND MR. SHANKOWITZ. HE WAS DENIED COMP TIME. ON HIS LAST DAY 2/20/03 HE TOLD HIS SUPV, MR. SHANKOWITZ THAT IT WAS NOT FAIR. HE TOLD HIM HE WAS NOT GOING TO COURT UNDER THOSE CIRCUMSTANCES. HE LEFT AT THAT POINT. HE FELT HE HAD BEEN FIREDSINCR MR. SHANKOWITZ TOLD HIM TO BEING (sic) ALL HIS FILES HE SAID HE NEVER DID A COURT APPEARANCE . HIS EMPLOYER NEVER CALLED HIM AFTER THIS INCIDENT. HE SAID IF HE HAD GONE TO COURT HE WOULD ONLY RECEIVED (sic) WAGES FOR WORKING 8 HOURS. IF HE WAS NEEDED TO STAY LONGER IN COURT THAN 8 HOURS HE WOULD NOT RECEIVE ANY OTHER COMPENSATION. HE AGREED WHEN HIRED TO WORK NIGHT COURT WHICH WOULD BE AN UNLIMITED AMOUNT OF TIME POSSIBILITY (sic) MORE THAN 8 HOURS. HIS TITLE WAS COLLECTION. HIS SALARY WAS $50,00.00 YEARLY. HE SAID THEY NEVER DISCUSED (sic) COMP TIME WHEN HIRED. HE THOUGHT THAT HE WOULD RECEVIE (sic) IT SINCE THIS WHAT USUALLY OCCURRED WITH OTHER EMPLOYMENT.

RATIONALE: THE CLAIMANT'S SEPARATION IS

CONSIDERED VOLUNTARY. HE INFORMED HIS SUPERVISOR MR. SHANKOWITZ HE HE (sic) WAS NOT GOING TO COURT APPEARANCES SINCE HE WAS NOT GOING TO RECEIVE ADDITIONAL COMPENSATION OR TIME. THE CLAMANT STATEMENT AND THE EMPLOYER STATEMENTS CONCUR WITH THE EVENTS THTAT (sic) LED TO HIS SEPARATION FROM EMPLOYMENT. THE CONDITION OF HIRE WAS THE CLAIMANT WAS A SALARIED EMPLOYMENT. (Sic) HE WASNOT ENTITLED TO OVERTIME. THE CLAIMANT STATED HE THROUGH (sic) HE WOULD GET OVERTIME OR COMP TIME SINCE THAT HE WHAT OCCURRED AT OTHER JOBS. (sic) IT WOULD HAD BEEN PREDENT (sic) FOR HIM TO HAVE QUESTIONED THIS AT TIME OF HIRE. HIS SEPARATION IS WITHOUT GOOS CAUSE SINCE THE EMPLOYER DID NOT VIOLATE THE CONDITIONS OF HIRE. HE LEFT FOR PERSONAL NONCOMPELLING REASONS. THE CLAIMANT IS DISQUALIFED (sic) FROM RECEIVING BENEFITS. THIS DETERMINATION RESULTED IN A WM SINCE THE CLAIMANT INDICATED HE WAS FIRED WHEN IN FACT HIS SEPARATION WAS VOLUNTARY.

DETERM: DISQ CORP TRANSP, WM

NYS DEPARTMENT OF LABOR
PO BOX 15131
ALBANY NY 12212-5131
(NOTE: Original document written in caps.)
NEW YORK SATE DEPARTMENT OF LABOR
NOTICE OF DETERMINATION TO CLAIMANT
REVISED DETERMINATION

DATED MAILED: 3/20/2003
SSN: 066-36-1299 LO:801

HARRY A CONNERS
30 FIFTH AVENUE 2D
NEW YORK NY 10011

PLEASE REFER TO THOSE ITEMS WHICH ARE SELECTED "X" BELOW AND READ THE BACK OF THIS FORM

1.
[XX] NOTICE OF DETERMINATION

NO UNEMPLOYMENT INSURANCE BENEFITS WILL BE PAID TO YOU FOR THE PERIOD BEGINNING 02/21/2003 UNTIL YOU HAVE SUBSEQUENTLY WORKED FOR AN EMPLOYER AND EARNED AT LEAST 5 TIMES YOUR WEEKLY BENEFIT RATE. EMPLOYMENT AND EARNINGS FROM NON COVERED, EXCLUDED OR SELF-EMPLOYMENT WILL NOT COUNT. YOUR WEEKLY BENEFIT RATE IS $405.

DETERMINATION

YOU QUIT YOUR JOB WITHOUT GOOD CAUSE.

REASON

YOU LEFT BECAUSE YOU WERE DENIED COMPENSATORY TIME FOR COURT APPEARANCES IN ADDITION TO YOUR REGULAR SALARY. THIS WAS NOT A CONDITION OF HIRE. YOU WERE A SALARIED EMPLOYEE EXEMPT FROM RECEIVING ADDITIONAL COMPENSATION OR TIME FOR COURT APPEARANCES.

2

[xx] NOTICE OF DETERMINATION OF WILFUL MISREPRESENTATION

IT WAS DETERMINED ON 02/27/2003

CLAIMANT MADE FALSE STATEMENTS. CLAIMANT'S RIGHT TO FURTHER BENEFITS IS REDUCED BY 004 DAYS UNTIL 02/26/2005

REASON

YOU MADE A FACTUALLY FALSE STATEMENT WHEN YOU APPLIED FOR BENEFITS.
YOU INDICATED YOU WERE FIRED WHEN IN FACT YOUR SEPARATION FROM EMPLOYMENT WAS VOLUNTARY.

xxx

This notice superceded the one sent you dated 03/19/03 which has been cancelled.

TO PROTECT YOUR RIGHTS, READ THE BACK OF THIS FORM

By: /s/ C KNIGHT
FOR THE COMMISSIONER OF LABOR

LO 412 (4-99)

NYSDOL-Business in New York-Unemployment Insurance

1660. Hours

Increase in hours; overtime

Good cause was found to exist for voluntary leaving of employment when evidence disclosed that claimant's normal working hours were increased without a corresponding increase in compensation. (A. B. 9964-43; A-750-552; similarly A.B. 37,900-53)

http://www.labor.state.ny.us/business_ny/unemployment_insurance/interp/Section_1600.htm

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE
ADMINISTRATIVE LAW JUDGE SECTION

In the Matter of the Liability for
Unemployment Insurance Contributions
under Article 18 of the Labor Law of:

Harry A. Conners
Claimant - Appellant

Corporate Transportation
Employer - Respondent

Linda Angello
Commissioner of Labor

Social Security Number: 066-36-1299
Case No.: 003-8907-0001
Appeal Board No.: 512635

Date of Hearing: May 12, 2003
Place of Hearing: New York, New York
Before: Henry Sullivan
Administrative Law Judge
Transcribed by: Karla J. Fischer
Appearances
Clt: Harry A. Conners
Emp: Corporate Transportation
Emp By: Sheldon Shankowitz, CFO

Case Duly Called

ALJ SULLIVAN: On the record. This is an adjourned hearing in the matter of Harry Conners, case number 8907.

The hearing is being held at 110 King Street, New York, New York on May 12th, 2003.

Present at the hearing are the claimant, Mr. Conners and a witness for the employer, Corporate Transportation Group Limited, Sheldon Shankowitz, chief financial officer.

My name is Henry Sullivan. I'm the administrative law judge assigned to hold this hearing.

According to my notes, I adjourned this hearing on April 25 because it was apparent that the claimant's copy of the hearing notice had been stapled to the employer's copy by mistake and received by the employer in the mail.

So the claimant did not have notice of the hearing on April 25.

I'm impartial and independent of the labor department representative who issued the initial determinations in this case.

The first of these disqualified the claimant from receiving benefits on the grounds the he voluntarily left his employment without good cause.

That determination gave the claimant the following explanation.

You left because you were denied compensary time for court appearances in addition to your regular salary.

Case Duly Called

This is not a condition of hire. You are a salaried employee exempt from receiving additional compensation or time for court appearances.

Further it was held that on February 27, 2003, the claimant made a willful false statement to obtain benefits.

As a result, the labor department imposed a penalty causing the claimant to lose four effective days of benefits which is equivalent to a loss of a week of benefits.

And that determination gave this explanation.

You made a factually false statement when you applied for benefits.

You've indicated you were fired when, in fact, your separation from employment was voluntary.

So those are the labor department's determinations and they and they frame the issues before me.

I'll be taking the testimony of all parties or witnesses under oath or affirmation by asking a few questions.

The employer's witness will testify first.

After each party or witness testifies, I'll offer the other party an opportunity to cross examine by asking questions.

After all testimony is completed, each party will be given an opportunity to make a closing argument or statement.

Case Duly Called

Each party may present witnesses and records or other documents that are important to their case or ask that such witnesses or documents be subpoenaed if they're otherwise unavailable.

Mr Conner's did you understand my explanation of our procedure?

MR. CONNERS: I do. I did.

ALJ SULLIVAN: Are you ready to go forward with the hearing?

MR. CONNERS: I'm ready.

ALJ SULLIVAN: Mr. Shankowitz, did you understand my explanation?

MR. SHANKOWITZ: Yes, sir.

ALJ SULLIVAN: Is the employer ready to proceed?

MR. SHANKOWITZ: Yes.

ALJ SULLIVAN: Raise your right hand, please, Mr. Shankowitz.

Shankowitz - Witness

SHELDON SHANKOWITZ, having been duly sworn, testified as follows:

BY ALJ SULLIVAN:

Q. What's the employer's line of business, Mr. Shankowitz?

A. We are a car service/limousine service.

Q. And what was Mr. Conners' position with the company?

A. Accounts receivable collections.

Q. When did he start working for you?

A. I really don't remember the day. I don't

have that.

MR. CONNERS: I can assist you.

ALJ SULLIVAN: No, you can't.

MR. CONNERS: Okay.

ALJ SULLIVAN: You'll be given a chance, Mr. Conners, in a moment but you shouldn't interject.

Q. Mr. Shankowitz, what was the last day he actually worked? Do you know that?

A. I don't remember the exact date and left. I do–

Q. There's a determination that disqualified the claimant from receiving benefits effective February 21, 2003 which would normally be the date after the last day worked.

Does that sound about right?

A. That sounds approximately right, yes.

Q. And approximately how long did he work for your company?

A. May Five, six weeks, four, five weeks.

Q. And what was his normal work schedule?

A. 9:00 till 5:00.

Q. Monday through Friday, correct?

A. Yes, unless there was extenuating circumstances.

Q. What was he being paid?

A. He was being paid 50,000 a year. I believe it breaks down to about $869.00 a week or something like that.

Shankowitz- Witness

Q. And was he a member of a union?

A. No.

Q. Did his job come to an end generally speaking because he quit, he was laid off or he was fired?

A. He quit.

Q. Did he give notice he was quitting?

A. No, we had a conversation about an half hour before lunch.

I assumed he went to lunch but he never came back.

Q. What was the conversation? Did it have anything to do with his leaving in your mind?

A. No, he had asked for additional either vacation time or hours in lieu of him going to small claims court in the evening.

And I had said to him that we were in a meeting with the owner of the company about two weeks before when he said, it's not a problem, I take care of everything, go to court and that the boss said that there's no additional compensation.

So when Mr. Slinin said that, he said to him at the end of the year we review everybody.

If you do a good job, you'll be compensated accordingly and he agreed and that was about two weeks before.

But on that day, my boss was traveling overseas and I couldn't reach him.

And I said to Mr. Conners, when, when Ed comes in on Monday, we'll all sit down and

maybe you could, you know, strike a new agreement with him.

Q. What was Ed's last name?

A. Slinin S-L-I-N-I-N.

Q. And his title?

A. President.

Q. President. Was Mr. Conners hired by Mr. Slinin or yourself or someone else?

A. Mr. Slinin.

Q. Were you Mr. Conners' immediate supervisor?

A. Yes.

Q. As the–

A. I would say yes.

Q. –chief financial officer?

A. I would say yes.

Q. Why do you hesitate?

A. I guess I'm the immediate supervisor for everybody in the company 'cause I'm next in line to the president.

So that makes me responsible.

Q. Is there a manager or someone else who might have been a more immediate supervisor?

A. No, I would probably say it's me.

Q. And what day of the week was that conversation, do you remember?

Was it Friday? You said–

A. No, I–

Q. –when, when the president returned on Monday, you'd have a further discussion?

A. It may have been a Wednesday or a Thursday 'cause he was missing for a few days and nobody could reach him on the phone.

Q. Okay.

A. It might have been a Wednesday at lunchtime.

Q. Did you personally try to reach the claimant?

A. I asked for his phone number from one of the people that knows him and from personnel and he didn't answer his phone.

The fellow that works for us tried to get him a number of times.

Q. Okay. You indicated Mr. Slinin was the person who hired the claimant.

Did you interview him though?

A. No. No, I was not in on the interview process.

Q. As I understand your testimony that the last discussion you had with Mr. Conners was that he'd have to wait until Monday when the president returns and perhaps can work something out?

A. That's what I said, okay. But we had a prior meeting.

Q. I understand that but how-what did-how did Mr. Conners respond after you indicated that to him?

A. He didn't say anything. He just looked at me and then he left the office.

That'S a decision–

Q. And this, and this–

A. I couldn't make.

Q. –and this had to do with appearances at small claims court, correct?

A. Yeah, and extra compensatory...

Q. But the small claims court appearances would have required him to work overtime?

A. It's not overtime. It's part of his job.

Q. Well, after, after the–

A. Well–

Q. –after 5 o-clock. Had there been any discussions by yourself and Mr. Conners about how often he'd have to go to small claims court?

A. As often it was necessary. He was the one who was making the small claims applications and he had a schedule of when he had to go.

One week it may have been two times. One week it may have been three cases in one evening, you know.

He had to schedule them.

Q. And it was Mr. Conners himself who would set the court dates?

A. Well, he files the applications and the court sets the date.

They notify him when the appearance is.

Q. Okay. And which small claims court?

A. On Lafayette Street in Brooklyn, I believe.

Q. Okay, and your office is also in Brooklyn?

Shankowitz - Witness

Is that correct?

A. Yes.

Q. I see from the hearing notice.

A. Yeah, about ten blocks.

Q. Could the small claims court appearances have been in the daytime?

A. The court sets the-small claims court sets the time and date.

Q. Do you have any experience of-does this small-is it-small-

A. It's only in the evening.

Q. It is only in the evening, that was my question.

And when this was first brought up, Mr. Slinin indicated to the claimant that this would be-the extra compensation would be dealt with if...

A. If there was extra compensation due him, it would be determined by the job that he did.

And it would be reviewed, you know, his job would be reviewed at the end of the year like we do everybody's.

Q. Okay, but this would was in terms of a salary increase at the end of the year or bonus at the end of the year or, or what?

A. Basically, it was-he used the word bonus.

Q. He used the word bonus?

A. Right.

Q. And you were present for that?

A. I was present for that.

Q. At any time did Mr. Conners have other discussions with you about the situation and report things back to you that you hadn't participated in, for instance, any other discussions that he had with Mr.--

A. The first time that he brought this up to me, I presented-I said to him, I can't make the decision, you have to speak with Mr. Slinin.

So we went into Mr. Slinin's office and that's when the conversation took place.

Q. I see. Okay. Is there anything else you think I should be aware of as to the circumstances under which the claimant's job came to an end?

A. Well, I mean it's unfortunate that it came to an end.

I mean we didn't anticipate this happening.

And when he left, he left on his own volition.

He didn't say goodbye. He didn't say, I'm not coming in.

He didn't say, I'm coming back Monday to talk to the boss.

He just left and everybody assumed he went to lunch.

Q. Do you know whether there was a.... whether the claimant, in fact, had gone to small claims court during the course of this four or five-week period that he was with your company?

A. If he went, I think he may have gone one

time, I believe.

I may be incorrect but he doesn't report to me.

Q. Did he happen to indicate when he was next scheduled to go to small claims court?

Did you have any idea?

A. No, not until he left, I reviewed his files and we have a calendar there of the dates.

We made a calendar of the dates.

Q. And what did you discover?

A. There were about five or six cases that were scheduled.

Q. Over how long of a period?

A. Three week period. Some were on the same night.

And some we were later notified by the court that the dates had been terminated because he filed an application that they couldn't deliver the subpoena.

They couldn't deliver two subpoenas. So two of the court cases were cancelled.

Q. And these were collection cases, correct?

A. Yes, they were.

Q. And these would be from customers that used–

A. Customers.

Q. –your services?

A. That's correct.

Q. That conversation that you described

that took place on Wednesday before lunch or about lunchtime, were there any witnesses to that conversation?

A. No, he came into my office.

ALJ SULLIVAN: Mr. Conners, any questions for Mr. Shankowitz before I take your testimony?

MR. CONNERS: Well, I don't wave the right to question now but my statement I think will cover–

ALJ SULLIVAN: I don't want–

MR. CONNERS: – my–

ALJ SULLIVAN: Okay, you are going to waive your right.

This might be your only opportunity to cross examine him.

MR. CONNERS: Okay then, I shall.

ALJ SULLIVAN: Go ahead. Go ahead. What's your question?

BY MR. CONNERS:

Q. When I walked into your office on that day, my last day of employment and told you that I could not go to court under the circumstances that we were in, did you say to me that if you're not going to court, I don't need you working here.

And that's not a question to you. And–

ALJ SULLIVAN: Just a moment, please–

MR. CONNERS: Sure

AJL SULLIVAN: You wanna put a

question to him.

MR. CONNERS: Well, it was part of the question.

ALJ SULLIVAN: But it's too many parts to it.

MR. CONNERS: Okay, then that will stand–

ALJ SULLIVAN: I haven't heard any–

MR. CONNERS: –as my first question.

ALJ SULLIVAN: Okay. Break it down because there was nothing in Mr. Shankowitz's testimony to establish the premise for your question.

So go with a short question–

MR. CONNERS: Okay.

ALJ SULLIVAN: –to establish–isn't it true that when I came into your office, I said something along those lines.

Go step by step with a series of questions.

Q. Is it true that when I came into your office, I told you that I couldn't live with this going to court without compensation?

A. True.

Q. Is it true that at that time you told me, if you're not going to court, I don't need you working here?

A. Not true. Not true. I said to you that when Ed gets back, we will discuss it with Ed.

MR. CONNERS: Okay. I disagree

that's–

ALJ SULLIVAN: No, don't give me any, any comments on the testimony.

MR. CONNERS: Okay.

ALJ SULLIVAN: Just straightforward questions and I'll get a direct answer to the point.

Any other, any other question for him, Mr. Conners?

Q. Did you, did you ask me to bring you all the cases that were scheduled for court?

A. Yes, I did.

Q. And did I bring them to you?

A. Yes, you did.

Q. And then did I sit down in your office to further discuss it and did you–

ALJ SULLIVAN: Hold on.

Q. –wave me away.

ALJ SULLIVAN: Hold on. Hold on. Mr Conners, you have to go step by step.

You started with one question and then before I heard an answer, you gave–put another question.

So slow down and go step by step.

MR. CONNERS: Okay. I didn't know I had a question unanswered.

ALJ SULLIVAN: Well, what, what you did–did I then bring the cases.

We sat down. Go ahead. What were you trying to establish with that?

MR. CONNERS: That he asked for all of the cases–

ALJ SULLIVAN: Yes.

MR. CONNERS: –that were scheduled for court so that he can handle them.

ALJ SULLIVAN: Did you indicate that you wanted those–

MR. SHANKOWITZ: I wanted the files–

AJL SULLIVAN: –files so that–

MR. SHANKOWITZ: –so we could determine what dates he had to go and how many dates he had to go.

And that was it. He put the file–you put the files on my desk and you walked out, okay.

You never came back. You never–

ALJ SULLIVAN: Hold, hold on, hold on. You're going way beyond the scope of the question Mr. Shankowitz.

Next question, Mr Conners.

MR. CONNERS: Okay.

Q. If there was a misunderstanding–

MR. CONNERS: I don't know if this is a proper phrased question but you'll tell me if it's not.

Q. If there was a misunderstanding about whether I was fired or not, you state that people tried to reach me.

My phone has an answering machine.

ALJ SULLIVAN: Hold on. This is testimony your giving, it's not a question.

Get to the heart of your question.

Q. Did you call me? Did you call me home to attempt to say, if you thought you were fired–

ALJ SULLIVAN: No, no–

Q. You're not–

ALJ SULLIVAN: Okay. I think the testimony was did you call and I think I asked that question.

MR. SHANKOWITZ: Yes, you did, your honor.

ALJ SULLIVAN: Okay, so go beyond that–

MR. SHANKOWITZ: That's already been answered.

ALJ SULLIVAN: He's acknowledged that he did call.

MR. CONNERS: Okay.

Q. Did you ask Ed Misella to call me?

A. Absolutely.

MR. CONNERS: Okay.

ALJ SULLIVAN: Go ahead. Any other questions?

Q. Are you aware if Ed Misella reached me?

A. He said he couldn't reach you. He reached you the next week, he said.

You wouldn't answer your phone.

Q. Did you write me a letter telling me that

Shankowitz - Witness
if I was under the impression I was terminated, I was not?

A. There was no need to write you a letter. You weren't terminated.

The only–

Q. That wasn't my question.

ALJ SULLIVAN: Okay, I think–

A. Did I write you a letter, no.

ALJ SULLIVAN: He an-he answered the question and said he did not write a letter.

Is that it then, Mr. Conners?

MR. CONNERS: I guess that's all I have in the line of question.

Conners - Witness

ALJ SULLIVAN: Raise your right hand.

HARRY A. CONNERS, having been duly sworn, testified as follows:

BY ALJ SULLIVAN:

Q. Mr Conners, tell me when you were hired.

A. I was hired January 17.

Q. And what was the last day you physically worked?

A. Excuse me, I started on January 20. I hired , you know, and then I cam and started on January 20 and I left on February 20.

Q. Wednesday, correct?

A. If that wa–I don't have that kind of

recollection, what day it was.

Q. Actually, calendar shows it as the 19th was a Wednesday.

So you think your last day was the 19th or could it have been the–Thursday, the 20th?

A. It could have been the 19th, you know. It was either one of those two days.

Q. Okay. And what were you earning?

A. 50,000.

Q. And is it correct that you were hired by Mr. Slanin?

A. That is correct, which was the third time I had interviewed with Mr. Slinin in the last two years.

Q. Okay. And did you have an interview with him just before you were hired such as on the 17th?

A. I did. Well, I don't know if it was on the 17th but yes, I had an interview prior to this hire.

Q. Okay. And did you have a discussion with him about your job duties?

A. Well, a general conversation with him, sure. My job was to collect and, and some of these cases would go to court and I would go to court at night.

Q. Was there any discussion about your having a modified work schedule or compensatory time off or additional pay for going to court at–

A. Not at the interview. At previous interview, yes.

Q. When was that?

A. A year ago, a year prior. And then a year prior to that.

There were three interviews.

Q. Okay. And is it correct Mr. Shankowitz testified that you were the one who did the scheduling of small claims court cases?

A. It, it's kind of correct. What you do is you go down and bring the form to the small claims court and each day there is a day posted that everyone who comes in that date will have a hearing on a certain 'nother date which is posted there for you.

Q. So if you have, let's say, three or four cases that need to go to court, you could have them all scheduled for the same night.

Is that correct?

A. Three yes, four no.

Q. Okay. All right. But three–

A. Yes, yes.

Q. –three at a time. And this was all in the Brooklyn small claims court?

A. Yes.

Q. Okay.

A. No, one of them was in the Staten Island Small Claims Court.

Q. Okay. Tell me when did the question of your getting compensatory time off or additional pay or a modified work schedule or any adjustment first come up after you had started working?

A. That would have been a conversation I had with Mr. Shanowitz where I did say to him, Shelly, instead of pay, I just as soon take, you know, time off court four hours, I'll take four hours time off in lieu of pay.

At which time he said, well, we're gonna have to talk with Ed Slinin about that.

Q. Any problem with that?

A. Pardon?

Q. Did you have any problem with dealing with Mr. Slanin on that?

A. No, he, he–no, Mr. Shankowitz was in in that meeting, no.

I mean I thought it was a no-brainer. No, I didn't have a problem.

Mr. Slinin and I had agreed on this on two prior interviews.

Q. Okay. But in–you never went to work for the company before January 20.

A. That's correct.

Q. Okay. Now, then did you, in fact, meet with Mr. Slanin and Mr. Shankowitz?

A. I did.

Q. And what happened then?

A. Well, he absolutely refused to give me any compensatory time off or pay.

Said it was part of my job and it wasn't discussed at this last interview.

I informed him that it was discussed at the previous two and I didn't think that it was

something that even needed to be discussed since in my opinion, I was not an exempt employee and I would have had to, again, in my opinion by law, either been paid or compensated in some way.

I managed no one.

Q. Well, were you told that you were going to be a salaried employee?

A. Well, yeah, I was a salaried employee. There is no question about that, I had a salary.

But I mean if I was out, I would be docked and if I would be off a half a day, I would be docked.

Q. Okay. How were things left at the end that discussion with Mr. Slanin?

A. That absolutely there would be no compensation for night court time and the appearances at night court, although I could put three cases together in a night were at least three nights a week and hopefully there–the cases are in that day.

Q. Just a moment. Why so many cases?

A. They had a lot of delinquency. They had things on the receivables that went back to '98.

And all these things were–

Q. Was this a back logged situation? In other words–

A. Incredible backlog situation. Some of them really should have–some of them I gave back in to write off.

The company had long perished.

Q. Okay. Tell me when you were hired, were you made aware that there was this backlog or did this come as a surprise to you?

A. I wasn't made aware but it didn't come as a surprise to me that there was a backlog of delinquency.

It's just normal that–

Q. Oh, okay. Did you find that there were any deadline for bringing these cases such as the–

A. Some. There were some so old that the statue of limitations which on services rendered is six years was getting close.

I did not find any that were actually beyond the statue of limitations.

Q. Is it correct as Mr. Shankowitz indicated though that you were the one who would be going to the court to process the cases?

In other words, that was within your control, you want, for instance, on a certain day to have three cases done and you would decide which ones would go forward at that point?

A. I'm not sure.

Q. Were you selecting, were you selecting the cases for court?

A. I was selecting them and bringing to Mr. Shankowitz for approval, yes.

Q. Was there any indication from Mr. Slanin that you would, in fact, possibly receive a bonus for this work at the end of the year?

A. No, not for this work. It's the policy, I

believe, that at the end of the year employees get bonuses.

The bonus would not have been because or in lieu of me getting compensation for a minium of 12 perhaps 16 hours a week over my 40 hours.

Q. Tell me did you mention that in the meeting with Mr. Slanin and Mr. Shankowitz?

A. Yes, I did.

Q. And that was the comment or reaction?

A. Mr. Slinin's reaction was that's, that's what the job entails, you're not getting any other compensation.

He was real brusque and quick about it. It was a very, very short interview.

It was, you know, put it in your pipe and smoke it, that's the way it is.

Q. And what did you–this was–this discussion was about two weeks before your last day?

A. Yes.

Q. Why did you continue working after that point?

A. Well, I didn't just wanna quit and that really caught me by surprise.

I was like, whoa, what, you know, and I thought about it a while.

And I came to the conclusion that it was grossly unfair.

I did slight research and talked to an attorney who told me that he thought it was

unlawful.

ALJ SULLIVAN: Just a moment. I need to turn the tape over.

OFF THE RECORD

ALJ SULLIVAN: I just turned the tape over. There was no discussion of the case while I was doing that and the recorder was off.

Correct Mr. Shankowitz?

MR. SHANKOWITZ: That's correct.

ALJ SULLIVAN: Mr. Conners, correct?

MR. CONNERS: That is correct.

Q. Now, what happened in the last meeting? Were there an–by the way, were there any other occasions in which you discussed with Mr. Slanin being compensated for the extra hours?

A. Yes.

Q. When was that?

A. On a prior interview about a year before.

Q. No, I, I–

A. No.

Q. –understand–

A. No.

Q. –that.

A. No.

Q. Okay. Now tell me about the last discussion that Mr. Shankowitz described.

How did that go? You heard his account.

A. Pardon?

Conners – Witness

Q. You had a last discussion with Shankowitz–

A. Yes.

Q. –on your last–

A. Oh, yes.

Q. What happened on that occasion?

A. On that occasion, you know, my testimony is in direct con–contravention with his testimony.

Mr., Mr. Shankowitz said, if you are not going to court, I do not need you working here, bring me all of the court files.

I then brought him all of the court files and went to sit down in his office and he motioned me away.

So I assumed I was fired. However, well, I'll wait your–

Q. And you applied for unemployment insurance benefits, when was that?

A. Right thereafter.

Q. Did you indicate to them why you were no longer working?

A. Yes.

Q. What reason did you give?

A. I said I was fired which I believe to this day I was.

Q. And do you have any comment on the attempts that Mr. Shankowitz described for them to try to reach you by telephone?

A. Yes. My telephone has an answering

machine and as a matter of fact, the person that they asked to contact me reached me.

Q. When was that?

A. That day, that afternoon because Mr. Shankowitz had gone to Ed Misella's office and said, what happened to Harry, where's Harry.

I haven't seen him in a couple of hours.

Ed Misella called me and said, what happened.

I said, and I had–Ed Misella comes from the company I last worked for.

We worked there together for a few years.

And I said, Shelly fired me over this court issue.

I told him I'm not going to court 12, 16 hours a week with no further compensation.

And he told me he didn't need me, give him the cases for court.

Ed said, well, listen, it can be worked out, it can be worked out.

Now, Ed had no authority to work it out.

And I said to Ed, have Shelly or Eddie or someone call me if they wanna work it out because I'll be glad to work it out.

No one called me and no one wrote me a letter saying that 'cause Ed, Ed Miselli, you see, knew very well that day that I thought I was fired.

Q. And what's his title?

A. Driver recruiter.

Conners – Witness

Q. Okay. Anything more that you think I should be aware of as to the circumstances under which your job came to an end?

A. Well, there are a couple things I wanted to hand to you.

Q. Well, I don't know if this is the appropriate time.

What did–what was the first thing you have in mind?

A. An affidavit from my former employer.

Q. Well, hold off on that. What else?

A. Well, I printed the New York State Labor Law.

Q. I don't, I don't think that's...

A. Okay. Well, it has to do with–

Q. I've got it all here.

A. I know that but it has to do with if I was to argue in the alternative and say, hello, I was fired and say–

Q. I don't want a closing argument yet.

A. Okay.

Q. This case isn't anywhere near over.

A. Okay.

Q. What else did you wanna give me? You said you had some things to give me.

A. Well, basically had wanted to give you, you know, I didn't know what to bring here so I brought a bunch of pa–I brought a lot of papers.

One has nothing to do with this case.

Q. Then don't mention it.

Conners – Witness

A. Well, it has to do with the department of labor and me signing into the benefits.

Q. No. No. You've already acknowledged–the only issue that I have with the department of labor is what you indicated the reason was why you're no longer working and I already have your testimony on that.

Why, why do I need something from your former employer?

What's that all about?

A. Well, it, it simply states and, and I think it was very generous for them to assist me in this matter since not that it matters for the purpose of the hearing, I was only here a month.

They have to pay for 22 weeks. Corporate pays for four.

The general manager makes a statement of the dates of my employment, that my job title was a collector and that my salary was $48,000.00 a year, that as part of my job, I went to small claims court an that that involved about four hours for each appearance when there was night court and that I was given four hours compensatory time off in lieu of pay for every court appearance.

And finally, it says that I was salaried but not an exempt employee since I did not manage or supervise anyone.

And it's signed, sworn to and notarized.

I mean that's the sum and substance of that.

Conners – Witness

Q. Did you prepare this for them?

A. I did.

Q. Just so it's clear what you were referring to.

A. Yeah.

ALJ SULLIVAN: I understand. I understand, Mr. Shankowitz, that that's only hearsay evidence but since the claimant's already testified to it, I might as well go along with his testimony.

MR. SHANKOWITZ: It's [Unitelligible–one word]

ALJ SULLIVAN: It's received then for the record as Claimant Exhibit A.

[Said document was Marked in Evidence as Claimant's Exhibit A as of today's date]

ALJ SULLIVAN: Questions for the Claimant Mr. Shankowitz?

MR. SHANKOWITZ: Yes your honor, thank you.

BY MR. SHANKOWITZ:

Q. You testified that you were fired. Is that correct?

A. Yes, it is.

Q. Okay. And a few moments later, you testified that I went to Ed Misella and asked him where you were?

If I fired you, why would I ask him where you were?

ALJ SULLIVAN: Don't answer that,

Conners – Witness

Mr. Conners. He can't answer what's in your m–that's more of an argument–argumentative question or rhetorical question Mr. Shankowitz.

He certainly can't try to guess what was in your mind.

Any other question for the claimant?

Q. When you came to me originally and you said to me the first time you wanted compensation for your time in court and I said to you, I can't make that decision, we'll talk to Ed when he comes in and we had the meeting the next day, he asked you when you came for your last interview before he hired you, he asked you..... he told you, correct, or, or incorrect, he told you that you're–

ALJ SULLIVAN: I'm I'm, sorry. You stopped and started and stopped and I got lost–

MR. SHANKOWITZ: All right.

ALJ SULLIVAN: –and it's probably my, my problem but could you–

MR. SHANKOWITZ: All right. I'll start over.

ALJ SULLIVAN: –rephrase your question, make it as clear and straightforward as you can.

Q. In the meeting that we had with Ed Slinin–

A. Yeah.

Q. –did he ask you how much you were

going to get paid . . . how much you wanted and you said 50,000.

Is that correct? In your meeting with Ed Slinin.

A. In the meeting that you were not present at.

Q. That's correct.

A. That's correct.

Q. Okay. In the meeting that I was present, did he say to you, you told me, you told me.....

MR. SHANKOWITZ: I'm sorry, your honor.

Q. You told Ed Slinin in that meeting that I was present that you did not ask for extra compensation and that, and that you forgot to ask for it in your, hiring process.

And he said to you–

ALJ SULLIVAN: Hold, hold, hold, hold on. Too many parts to this.

Did you indicate to Mr. Shankowitz and Mr. Slanin in the meeting that you forgot to bring up the question of additional compensation?

MR. CONNERS: No, I didn't forget to. I didn't forget to.

ALJ SULLIVAN: Okay, that's sufficient . Next part of the question?

Q. Did he tell you in the meeting that I was present at that you would be reviewed–

ALJ SULLIVAN: No, he's already–

Conners – Witness

Q. –based on the job you were doing.

A. He, he probably did, yeah.

ALJ SULLIVAN: Is that–

A. It had nothing to do with the issue but he probably did.

ALJ SULLIVAN: Is that it as far as Questions?

MR. SHANKOWITZ: Just two more Quick questions.

Q. Did you tell unemployment that you were an hourly employee?

A. No, I most certainly did not 'cause the lady asked me what I made and, and I told her my true salary.

I certainly did not tell her I was an hourly employee.

Although when I was out a portion of a day, I was docked.

So this exempt thing although I searched all over, I couldn't find it, so I relied on legal opinion from–

Q. So then–

A. –the printing.

Q. –you're saying to me that when unemployment and whoever's handling your case for unemployment, the lady called me and asked me what your hourly wage was, I told her you're not an Hourly employee, she said to me that you lied to her.

You're telling me that she's lying?

Conners – Witness

ALJ SULLIVAN: Hold on, hold on, hold on.

A. I'm not saying–

ALJ SULLIVAN: I think the claimant asked–answered your question, what he told her and I think your next question is too argumentative.

MR. SHANKOWITZ: Okay, I'll wait for her.

ALJ SULLIVAN: Is that it then?

MR. SHANKOWITZ: Yes, sir.

Proceedings:

ALJ SULLIVAN: Okay. This is the situation.

The claimant is basically saying that he understood he was fired because he was not willing to go to small claims court on these collection cases without some sort of additional compensation.

That issue has not been identified on the notice of hearing.

The labor departments determination was that the claimant voluntarily left his employment.

In view of the testimony I've heard from Mr. Conners, I have to consider whether, in fact, he lost his job involuntarily but due to misconduct which would also be a disqualifying condition such as by refusing to continue by saying he was not gonna go to

small claims court without additional compensation in the circumstances and that that precipitated the termination of his employment.

Corollary for such a disqualification for misconduct would be whether or not the claimant–would be that the claimant could not use any wages that he earned from this employer to establish a claim for unemployment benefits in the future if he should file one.

Neither party has had notice that I would consider this alternative basis for deciding the case but I think it's appropriate to do that in view of Mr. Conners' own testimony.

In view of that, the parties may wish to request an adjournment so that they could prepare on that issue.

Also, the claimant has identified a potential witness here, Ed Miselli, driver recruiter.

In connection with any adjournment, either party or both parties might want to Hear from Mr. Miselli.

MR. CONNERS: Misella, yeah.

ALJ SULLIVAN: Misella?

MR. CONNERS: Yeah.

ALJ SULLIVAN: Okay. I could simply direct the employer to produce him at the

adjourned hearing and then there's Mr. Slanin himself because the claimant has testified about having had a prior interview, actually two interviews when this came up.

So he had an expectation that he would have this compensation.

So all of this is relevant. My question is at the outset, would either party like to ask for an adjournment of the hearing on the basis that the haven't had notice that I'd be considering the issue of loss of employment through misconduct and perhaps also to have other witnesses brought In.

I'll start with you, Mr. Conners.

MR. CONNERS: Well, certainly, you know, I guess I can't have best of both worlds.

I, I would prefer not to have an adjournment–

ALJ SULLIVAN: Okay, that's fine.

MR. CONNERS: –because I think–

ALJ SULLIVAN: I'm not going to twist your arm.I'm not going to twist your arm.

MR. CONNERS: No, but I have a question.

ALJ SULLIVAN: All right.

MR. CONNERS: About this misconduct and if I understand you correctly that my merely saying that I wasn't going to

go to court could constitute misconduct and that I would like to give a piece of paper to you.

And I know you know the state law.

ALJ SULLIVAN: I don't know whether I'm adjourning the case or not, so hold off. But you're not asking for an adjournment, correct?

That's all I'm trying to find out, whether either party wants to ask for an adjournment at this time.

MR. CONNERS: No.

ALJ SULLIVAN: No. Okay. How about you–

MR. SHANKOWITZ: No, sir.

ALJ SULLIVAN: Then I will take closing statements.

I'm going to take yours first Mr. Shankowitz.

Is there anything more that you'd like to add before I close the hearing?

MR. SHANKOWITZ: No, your honor. I'm comfortable with what was said and whatever decision you make we'll abide by.

ALJ SULLIVAN: Okay. Mr. Conners, you get the last word. Go ahead.

MR. CONNERS: Okay. I would like to point out to you something in the unemployment insurance law and I think it's Index 1660, it refers to increase in hours,

overtime.

And I'm only gonna read the part that pertains.

Good cause was found to exist for voluntary leaving from employment where evidence disclosed that claimant's normal working hours were increased without a corresponding increase in compensation.

And then there are numbers, I guess, it's case law, I guess it's cases.

There are AB numbers. And my, my closing argument, in my closing argument. I was not an exempt employee and I really couldn't even in researching the New York State Labor Law find out with any firmity what an exempt employee is as opposed to a salary employee, lots of salaried employees and they're not exempt.

It was my understanding from federal law which has nothing to do with this that an exempt employee is one that has nothing to do with salary but it has to do with whether you supervise or manage anyone.

I supervised and managed no one. The other point that I would like to bring up and I–you saw the letter from Empire and you have it in front of you, I cannot imagine the common sense of me leaving a $48,00.00 a year job to go to a $50,000.00 a year job in an outer borough–Empire is very close to my

home–for 2,000 more dollars a year and 12 and possibly 16 more hours a week at age 59.

That's not what I was looking to do.

ALJ SULLIVAN: Okay. Thank you both for participating in the hearing.

I'll be preparing a written decision now.

It'll be mailed to you. The hearing is now closed.

Please leave the hearing room together.

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This is to certify that I typed the above record from a cassette(s) produced from an electronic sound recording system in the State of New York and that to my best knowledge ans believe the above record as typed by is a true and accurate record of the audiotape contents of the cassette(s).

/s/ Karla J. Fischer
The Mechanical Secretary, Inc.